U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 693-7365 (FAX)

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CASE NO.: 2001 AIR 3

In the Matter of

WILLIAM H. PECK
Complainant

v.

SAFE AIR INTERNATIONAL, INC.
d/b/a ISLAND EXPRESS
Respondent

APPEARANCES:

Mr. William H. Peck, *Pro Se*

Mr. Brian Kopelowitz, Attorney
For the Respondent

Ms. Krista M. Fox, Attorney
For the Federal Aviation Administration (pre-hearing motion)

Mr. Rafael Batine, Attorney
For the U.S. Department of Labor (pre-hearing motion)

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21"or "Act"). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety.

Procedural Background

On June 28, 2000, Mr. William Peck filed a complaint with a representative of the Secretary, U.S. Department of Labor ("DOL"), alleging that Island Express had terminated him from employment because he had contacted the FAA on May 15, 2000 and indicated that Island Express was not performing timely inspections on its aircraft. On April 26, 2001, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), DOL, who investigated Mr. Peck's complaint, notified the parties that she found no merit to the complaint. Specifically, the Regional Administrator determined that Island Express had no knowledge of Mr. Peck's protected activity at the time he was terminated. Instead, based on an independent contractor's finding upon inspection of the company's aircraft and its maintenance records that the plane had not been maintained in compliance with FAA standards since February 2000, Island Express terminated Mr. Peck's employment as the Director of Maintenance for the company's aircraft on May 15, 2000. On June 16, 2001, in response to the Regional Administrator's notice, Mr. Peck objected to the stated findings and requested an administrative hearing.

Pursuant to a Notice of Hearing, dated July 5, 2001, I set a hearing date of August 2, 2001 (ALJ 1).[1] However, on July 30, 2001, due to the withdrawal of the Respondent's counsel, I continued the hearing until September 20, 2001 (ALJ 2). On September 20, 2001, under the provisions of 49 U.S.C. §42121 (b) (2) (A),[2] I conducted a hearing in Fort Lauderdale, Florida. Mr. William H. Peck and Mr. Brian R. Kopelowitz (Respondent's new counsel) were present. A representative for DOL did not attend the proceeding.

Complainant's Statement of the Case[3]

As the Director of Maintenance for Island Express' aircraft, Mr. Peck had to accomplish an FAA regulatory-mandated inspection of the plane after every 60 hours of flying time. In the early part of May 2000, based on his knowledge of the plane's schedule, Mr. Peck asked for the aircraft's actual flying time so he could ensure a timely inspection. When the company's Director of Operations did not give him the requested time, Mr. Peck did his own calculation and became concerned that the plane may be flown beyond the 60 hour threshold for the next inspection. Consequently, in the early morning of May 15, 2000, Mr. Peck called an FAA inspector and requested her help in determining whether the aircraft was over-flying the maintenance inspection point. In response, on the same day, the FAA inspector did a ramp inspection of the aircraft and its records. After the inspection, with the company chief pilot present, the

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[1]The following notations appear in this decision to identify specific evidence: CX - Complainant exhibit; RX - Respondent exhibit; ALJ - administrative law judge exhibit; and, TR - Transcript of hearing.

[2]At the time of the hearing, the Secretary, U.S. Department of Labor, had not yet published implementing regulations concerning proceedings under AIR 21. Consequently, I utilized the provisions in 29 C.F.R. Part 24, *Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes.*

[3]TR, pages 24 to 30, 37 to39, and 289 to 294, and September 22, 2001 written summary.

FAA inspector called Mr. Peck with the aircraft's flight time. Mr. Peck then spoke with the chief pilot who indicated the aircraft needed some maintenance work since the FAA found some discrepancies. Two days later, the Island Express terminated his employment as the company's Director of Maintenance as of May 15, 2000.

Due to the timing of his termination in relation to the FAA inspection and the presence of the company chief pilot when the FAA inspector called Mr. Peck on May 15th, Mr. Peck asserts his termination at about the same time was not just a coincidence. He was separated from his employment due to his complaint to the FAA and not the purported unwarranted maintenance recommendation Island Express has presented as one the justifications for his termination.

Starting August 1999, Mr. Peck received a pay check from Island Express for aircraft maintenance. But in the spring of 2000, due to the company's financial problems, Mr. Peck indicated he did not need a salary as long as they shared a hanger. There was no contract setting out, or changing, their relationship.

If Mr. Peck prevails in his proving his complaint, he does not desire to return to work with Island Express. Instead, he seeks compensatory damages equal to his lost salary with Island Express at his usual $1,000 weekly salary, plus interest and litigation expenses.[4]

Respondent's Statement of the Case[5]

Mr. Peck's attempt to seek whistle blower protection and relief under AIR 21 fails for several reasons. First, and principally, Island Express had no knowledge of Mr. Peck's complaint to the FAA. Since the FAA does random ramp inspections, the fact the FAA conducted an inspection of the Island Express aircraft on May 15th did not give the company any reason to believe Mr. Peck, or anyone, had made a complaint. Consequently, when Island Express terminated Mr. Peck, the company had no knowledge of his protected activity.

Second, Mr. Peck was fired for a number of legitimate reasons unrelated to his complaint to the FAA. By May 2000, the relationship between Mr. Peck and Island Express had deteriorated badly. About that time, on May 15th, not trusting Mr. Peck's finding that the aircraft needed expensive cylinder replacement, the company had an independent aircraft mechanic inspect the plane. This maintenance expert advised that the aircraft's cylinder's were fine and did not need replacement. At that point the

[4]Mr. Peck also sought permission to seek punitive damages. However, such relief is not an available remedy under AIR 21. *See* 49 U.S.C. § 42121 (b) (3) (B). In addition, due to his concerns about the financial viability of Island Express, Mr. Peck requested that the officers, owners and shareholders of Island Express be held personally liable. I simply note that the named air carrier in this case is Safe Air International, Inc., d/b/a Island Express and any subsequent compliance issues that may result from my Recommended Decision and Order are brought before, and resolved by, an appropriate U.S. District Court. *See* 49 U.S.C. § 42121 (b) (6).

[5]TR pages 30 to 37 and 294 to 298.

operators of Island Express concluded they could no longer trust Mr. Peck as their maintenance chief. As a result, the company sent Mr. Peck a letter terminating his services.

Third, after February 2000, Mr. Peck really was not even an employee of Island Express. Instead, based on an arrangement between Mr. Peck and Island Express, he worked as an independent contractor providing maintenance service to Island Express in exchange for his use of a hanger provided by Island Express. So, on May 15, 2000, Island Express simply terminated his services as an independent maintenance contractor.

Ultimately, because Mr. Peck has failed to prove that Island Express didn't know about his protected activity, the reason they fired him is irrelevant. Absent proof of the employer's knowledge of the FAA complaint by Mr. Peck, his discrimination complaint under AIR 21 fails. In addition, Island Express has demonstrated by clear and convincing evidence that it had independent grounds for firing Mr. Peck. Consequently, Island Express requests that in addition to the denial of his claim, Mr. Peck be ordered to pay attorney fees and costs as authorized by AIR 21. Finally, even if Mr. Peck proved his complaint, his relief is limited to half the space of the hanger that he shared with Island Express.

Issues[6]

1. Whether the Complainant, Mr. William Peck, was an employee of the Respondent, Island Express, on May 15, 2000.

2. Whether the Complainant, Mr. William Peck, engaged in a protected activity under AIR 21 on May 15, 2000.

3. If the Complainant, Mr. William Peck, engaged in a protected activity as an employee of the Respondent, Island Express, whether the Respondent was aware of the protected activity and the protected activity contributed in part to the decision by the Respondent to terminate the services of the Complainant.

4. If the Complainant, Mr. William Peck, establishes a *prima facie* case of a violation of the employee protection provisions of AIR 21, whether the Respondent, Island Express, has demonstrated by clear and convincing evidence that it would have terminated the Complainant, even in the absence of the protected activity.

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[6]As an early response to Mr. Peck's discrimination complaint, Island Express' former counsel asserted that Mr. Peck's complaint was untimely (CX 5). However, 49 U.S.C. § 42121 (b) (1) allows an individual 90 days after an alleged violation of AIR 21 to file a complaint. Since Mr. Peck filed his complaint with DOL on June 28, 2000 and OSHA notified him on July 27, 2000 that an investigator had been assigned to his complaint (CX 2), the timeliness of Mr. Peck's complaint is not an issue.

5. If the Respondent, Island Express, presents clear and convincing evidence of a legitimate motive for terminating the services of the Complainant, Mr. William Peck, whether the Complainant establishes by the preponderance of the evidence that the Respondent retaliated against him for engaging in protected activity.

6. Whether the compliant under AIR 21 by the Complainant, Mr. William Peck, was frivolous or brought in bad faith.

Preliminary Evidentiary Issues

Mr. Peck attached to his written closing argument, dated September 22, 2001, three documents that he requested I consider. The first document contained a page from his previously admitted exhibit, CX 10, with two highlighted portions. Since CX 10 is already in the record, I will not admit the newly submitted document. I will just consider the highlighted sections as part of Mr. Peck's closing statement. I have marked the attached, highlighted documented as CX 18, offered post-hearing, not admitted.

Mr. Peck also attached a copy of the Florida law concerning private whistle blower actions for my consideration. However, at the conclusion of the hearing, I kept the record open for the sole purpose of providing Mr. Kopelowitz with the opportunity to obtain a deposition from an OSHA investigator concerning the chronology of this case as set out in CX 9 (TR, pages 13 to 18, and 298 to 300).[7] Other than that one exception, the record closed at the end of the hearing. As a result, I will not admit, nor consider, the Florida whistle blower provisions. I have marked the document as CX 19, offered post-hearing, not admitted. I also note the Florida law has little, to no, relevance in this proceeding conducted under a Federal whistle blower protection statute.

Finally, Mr. Peck submitted with his closing comments a letter from the FAA in Washington, D.C., dated September 13, 2001, stating that as a "preliminary finding" the FAA's investigation of Mr. Peck's complaint established that a violation of an order, regulation or standard of air carrier safety "may have occurred." As a result, the FAA was taking "appropriate corrective or enforcement action concerning this matter." At first pass, since the letter is dated September 13, 2001 and the record had essentially closed at the end of the September 20th hearing, this letter faces the same procedural exclusion hurdle facing the Florida whistle blower statute submission.

However, I will admit the document for two reasons. First, Mr. Peck asserts that he did not receive the letter until the day after the hearing. Since he did not receive the letter in time to present it at the hearing, I will not penalize him for the late arrival of the letter. Second, Mr. Peck sent Mr. Kopelowitz

[7] In light of a pre-hearing motion submitted by DOL to quash Mr. Peck's subpoena of an OSHA investigator (which I received just before the hearing started and did not act upon) (ALJ 5), I doubted the attempt to obtain a post-hearing deposition of an OSHA investigator would be successful (TR, page 16). Since Mr. Kopelowitz did not submit a post-hearing deposition, I assume my doubt was correct.

a copy of his September 22, 2001 correspondence with attachments. To date, I have received no objection from Mr. Kopelowitz concerning the admission of the FAA letter. Accordingly, the September 21, 2001 from the FAA to Mr. Peck is marked and admitted as CX 20.

Summary of Documentary Evidence and Testimony

My decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to CX 17 and CX 20, and RX A to RX E.

Complainant's Case

Documentary Exhibits

CX 1 - In his draft statement to the OSHA investigator, Mr. Peck advised that he was named as the Director of Maintenance for Island Express and paid a weekly salary from August 1999 until a few months before May 2000. At that time, he entered into a "business relationship" with Island Express by sharing hanger space with the company at the local airport where he conducted his own personal business. He had been accomplishing regular maintenance on a Cessna 402 with his last inspection completed on May 3, 2000. He informed Mr. Mel Gordon that the aircraft would become due for maintenance by mid-May and that he believed the aircraft was running too many hours beyond the FAA regulations without proper maintenance. When Mr. Gordon did not respond, Mr. Peck called the Fort Lauderdale FAA office on May 15, 2000 and complained that the aircraft was unsafe because it was not getting proper maintenance. The FAA inspected the aircraft on May 15, 2000. Mr. Peck worked two more days and then received a letter on May 17, 2000 indicating Island Express terminated his maintenance services as of May 15, 2000.

CX 2 - July 27, 2000 letter from OSHA Supervisory Investigator to Mr. Peck informing him that Mr. Clarence Kugler will investigate his complaint.

CX 3 - Mr. Peck's August 7, 2000 letter to Mr. Kugler. Mr. Peck indicated he started working for Island Express as the Director of Maintenance in August 1999 with a weekly salary of $1,000. He found the company's maintenance department "rampant with inefficiencies" but turned the department around. Following Island Express' eviction from their maintenance area at Fort Lauderdale International Airport in October 1999, Mr. Peck met with company officials and agreed to share hanger space with Island Express and also pay a percentage of labor and utility expenses to supplement the overhead. He loaned Island Express $5,000 to secure the hanger and office space. The loan was paid off eventually.

During his last few months as Director of Maintenance, the company only operated one aircraft, a Cessna 402 C. He worked hard to keep that one aircraft flying. When the aircraft needed extensive maintenance, Mr. Peck received a hostile response but the company complied. During a May 3, 2000 routine "B" inspection, Mr. Peck identified several mechanical deficiencies that needed correction.

Eventually, the chief pilot agreed that the deficiencies would be addressed at the upcoming 60 hour phase inspection. About mid-May, based on his knowledge of the average daily use of the aircraft, Mr. Peck became concerned that the aircraft would be operated past the inspection due time. After he failed to get a definitive response from Mr. Gordon, the Director of Operations, Mr. Peck called an FAA inspector on May 15, 200. By 11:30 a.m. the same day, the FAA inspector, Ms. Ferrara, had inspected the aircraft, determined it needed several repairs, stopped the aircraft from carrying paying passengers and called Mr. Peck to inform him of the current flight hour meter reading and the condition of the aircraft. The company's chief pilot then spoke with Mr. Peck and he told the chief pilot to bring the aircraft to Fort Lauderdale Executive Airport for the necessary maintenance. However, the aircraft never arrived. Without any further communication, he received notice of his termination by Island Express on May 17, 2000.

Consequently, Mr. Peck alleged a violation of the whistle blower protection provisions of AIR 21. He sought back wages, wages for employees who had serviced the Island Express' aircraft, and reimbursement for parts installed on the aircraft totaling $31,800.31.

CX 4 - Mr. Kugler's September 5, 2000 letter to Mr. Peck indicating that Island Express asserted Mr. Peck was not its employee when it severed its connection with All Aerotech, Inc. Mr. Kugler asked for Mr. Peck's dates of employment.

CX 5 - Mr. Kugler's September 6, 2000 letter to Mr. Peck indicating that he intended to recommend that the AIR 21 case be dismissed as untimely. This exhibit also contains Mr. Lawrence Metsch's September 1, 2000 letter to Mr. Kugler. At this time, Mr. Metsch was counsel for Safe Air International, Inc. doing business as Island Express. He asserted that Mr. Peck was not employee of Island Express on May 15, 2000, and he had not submitted his OSHA complaint within 30 days of the alleged incident on May 15, 2000. According to Mr. Metsch, the employer-employee relationship terminated on December 31, 1999. Starting January 1, 2000, Mr. Peck "served as an independent aircraft maintenance contractor for, and Director of Maintenance of, Island Express." The independent contractor relationship was terminated by Island Express on May 15, 2000. As further proof, Mr. Metsch observed that Mr. Peck, as President of All Aerotech, had placed a corporate mechanic's lien on the Island Express' aircraft for installed parts and labor on August 15, 2000. Also, based on an incident date of May 15, 2000, Mr. Metsch assented Mr. Peck's claim was untimely.

CX 6 - Mr. Peck's September 22, 2000 letter to U.S. Senator Connie Mack, explaining his situation, frustration with the OSHA investigative process, and the circumstances surrounding his visit by an FBI agent concerning an alleged threat Mr. Peck made to Mr. Kugler. Mr. Peck formally charged OSHA with violating his "constitutional rights. . . right to due process. . . and using the FBI to harass and intimidate" him.

CX 7 - Mr. Kugler's October 2, 2000 letter to Mr. Peck explaining the status of his case.

CX 8 - Mr. Peck's October 5, 2000 response to Mr. Kugler refuting that his status with Island Express had changed on December 31, 1999. If that had been the case, then Island Express should have notified the FAA of a change in their approved maintenance plan. But the company sent no such notification. In addition, the May 15, 2000 termination letter names only Mr. Peck and not his company.

Since it appeared another company might buy out Island Express, Mr. Peck stayed on as the Director of Maintenance with the company after February 2000 in the same employee status. The parties understood that he would be compensated in the future for the service he and his company provided to subsidize Island Express pending the take over by another company. Attached to his letter was a copy of the May 15, 2000 letter from Island Express to Mr. "Bill Peck." formally notifying him that as of May 15, 2000 the company no longer required his services as Director of Maintenance. The letter was signed by Ms. Mayra Horna, with a copy to Ms. Ferrara.

Finally, Mr. Peck attached several pay stubs from December 30, 1999 to February 10, 2000 from Safe Air International, Inc. to Mr. Peck, showing typical employee withholding and deductions. The last pay stub, dated February 10, 2000, shows deduction for "federal withholding, social security employee, and medicare employee" taxes.

CX 9 - November 7, 2000 cover letter and attached chronology from Mr. Kugler to Mr. Peck. Mr. Kugler inquires what monetary loss Mr. Peck suffered since he stopped receiving a salary in February 2000 and Island Express was not paying the hanger rent. The chronology shows Mr. Peck received his first pay check from Safe Air International, Inc. on August 13, 1999 for $1,000 covering the period July 31, 1999 to August 6, 1999. On October 28, 1999, Mr. Peck loaned Island Express $5,000 so that the company could purchase hanger space. On November 1, 1999 Mr. Peck and Island Express moved into the new hanger location. According to Mr. Peck, he agreed his new company, All Aerotech, would pay Island Express one-third of its business revenue it earned in the hanger. Mr. Peck would remain Director of Maintenance of Island Express. February 10, 2000 documents the last paycheck to Mr. Peck as an employee of Island Express although he remained on their books as the Director of Maintenance. On May 3, 2000, Mr. Peck raised his concern about phase inspections with company officials. On May 15, 2000, Mr. Peck called the FAA with a charge the company's aircraft records may be altered. On May 17, 2000 Island Express was informed that the company was behind in rent by over $5,000 and faced eviction. On the same day, Mr. Peck and Island Express sign a memorandum in which Island Express agreed to vacate the hanger by May 31, 2000 in exchange for Mr. Peck's immediate return of all log books and records related to the company's aircraft to Mr. Gordon. On May 17, 2000, All Aerotech billed Island Express $31,813.35. And, finally on the same day, Mr. Peck received his termination notice. On May 18, 2000 Island Express was informed that a lien would be imposed for overdue hanger and fuel bills. At the same time, Mr. Peck was able to lease the hanger provided Island Express vacated the premises. Mr. Peck filed his discrimination complaint with OSHA on June 28, 2000. Finally, on August 15, 2000, Mr. Peck, as President of All Aerotech, Inc. filed a claim of lien against Island Express for parts and labor.

CX 10- Regional Administrator's April 26, 2001 letter notifying Mr. Peck that OSHA found his complaint had no merit essentially because Island Express had no knowledge of his protected activity at the time they terminated his services as Director of Maintenance.

CX 11 - On June 16, 2001, Mr. Peck objected to the OSHA findings and requested an administrative hearing.

CX 12 - Ms. Ferrara's August 9, 2000 memorandum advising completion of her investigation into Mr. Peck's May 15, 2000 complaint concerning Safe Air International overflying an inspection and possibly tampering with the flight time meter. The letter is accompanied by an investigation file. Ms. Ferrara indicated that as a result of overflying an inspection, enforcement action was taken against Safe Air. The investigation file shows the FAA informed Mr. Gordon, Director of Operations for Safe Air International, Inc. that the May 15, 2000 ramp inspection of their aircraft disclosed numerous discrepancies. By June 1, 2000, Ms. Ferrara concluded the aircraft had over flown the "120" inspection by 3.2 hours.

CX 13 - Ms. Ferrara's December 8, 2000 enforcement package. In her report, Ms. Ferrara determined Safe Air International had operated its aircraft 3.1 hours with an inspection overdue violating several provisions of the FAA regulations. She also observed that Mr. McHugh, a certified FAA airframe and powerplant mechanic who disclosed the overflight in a June 5, 2000 letter, was not fully aware of Safe Air International's aircraft inspection program. Further, a review of the aircraft records showed that following a "B" inspection on May 3, 2000, with the aircraft hour meter reading 6122.7, the next "C" 60 hour inspection due on the aircraft at 6182.7 hours. However, that inspection was not accomplished until May 19th when the aircraft registered 6185.8 hours.

CX 14 - October 28, 1999 promissory note of a personal loan of $5,000 from Mr. Peck to Island Express/Safe Air International, Inc.

CX 15 - May 15, 2000 letter from Island Express terminating Mr. Peck as the Director of Maintenance.

CX 16 - Handwritten list of 27 aircraft maintenance deficiencies.

CX 17 - Memorandum acknowledging a May 17, 2000 agreement between Mr. Peck and Ms. Mayra Horna that Island Express agrees to vacate the hanger in exchange for Mr. Peck's return of the record on Island Express' aircraft.

CX 20 - September 13, 2001 letter to Mr. Peck from the FAA indicating Mr. Peck's complaint established a violation of an FAA order, regulation, or air carrier safety standard. Mr. Peck was also informed that the FAA was taking appropriate corrective or enforcement action.

Sworn Testimony

Ms. Jean Ferrara (TR, pages 47 to 87)

Ms. Ferrara is an airworthiness inspector and assistant principal maintenance inspector who has worked for the FAA for twelve years. According to her documentation (CX 12 and CX 13), she received a telephonic complaint on May 15th from Mr. Bill Peck, Director of Maintenance for Island Express/Safe Air. In the conversation, Mr. Peck expressed his belief that someone may have tampered with the Hobbs meter[8] on the Island Express aircraft. Mr. Peck was also concerned about the aircraft's next mandatory inspection and maintenance. According to Mr. Peck, the last recorded flight time he received was 6164.7 hours on May 10th. The next required maintenance inspection was due in 18 flight hours and since the aircraft flew about six hours a day, Mr. Peck was concerned that the aircraft may be overflying its next scheduled maintenance.

Because Island Air was engaged in transporting commuters, Ms. Ferrara immediately responded to Mr. Peck's complaint. After checking the flight schedule and noting that the aircraft was available, Ms. Ferrara and an avionic inspector went out to the aircraft and conducted a ramp inspection. The Cessna aircraft was located at the Fort Lauderdale International Airport ("International Airport"), where Island Express usually picked up passengers. During the ramp inspection, they examined the aircraft's exterior, interior, maintenance log with recorded flight times, and Hobbs meter. Upon examination, the inspector found several maintenance discrepancies that required correction. These discrepancies were unrelated to Mr. Peck's complaint. The Hobbs meter reading was 6177.2 hours, which matched the starting flight time recorded in the maintenance log for the start of May 15th.

After the inspection, Ms. Ferrara went into the Island Express ticket office and spoke with Mr. Peck to inform him about the maintenance deficiencies. She talked to him because he was the Director of Maintenance for Island Express. When Mr. Peck asked her about the Hobbs meter, Ms. Ferrara indicated that the meter had been inspected; however, the inspectors found other maintenance problems that needed attention. At the time she spoke to Mr. Peck, Mr. Lucian Horna, the chief pilot for Island Express, was present in the office. Also, while in the office, Ms. Ferrara also spoke by telephone with Mr. Mel Gordon about the maintenance problems. She did not tell him how she happened to be there to conduct the inspection.

Upon her return to her office, Ms. Ferrara's immediate concern was the noted maintenance discrepancies. She was concerned about whether the aircraft was sufficiently airworthy to carry passengers. Consequently, she first wrote a letter to Island Express about the discrepancies and documented the results of the inspection. Then, Ms. Ferrara turned to the issue of overflying an FAA required inspection. To verify the accuracy of the flight times recorded on the Hobbs meter and in the

[8]Ms. Ferrara explained that the Hobbs meter on an aircraft records flight time, in terms of engine time or propeller time, and is used in a manner similar to an automobile odometer.

maintenance log, Ms. Ferrara attempted to obtain a record of the aircraft's flights from the U.S. Customs Service. However, even with those records, she was unable to verify that on May 15th, the Island Express aircraft had overflown its mandatory maintenance inspection, since its recorded flight time was 6177.2 hours and the maintenance inspection was due at 6182.7 hours of flight time.

About a week later, Ms. Ferrara did receive notice from Mr. Terry McHugh, the new Director of Maintenance for Island Express, that they had overflown a required inspection about two days later. When the aircraft received the inspection on May 19th, it had overflown the due time by 3.1 hours. Ms. Ferrara examined her documentation again and determined the company overflew the next required maintenance inspection by about that amount. The overflight occurred sometime between May 15th and May 19th. In light of the investigation and Island Express' admission, Ms. Ferrara initiated an enforcement report concerning Island Express. At the time of the hearing, Ms. Ferrara was unable to comment on the status of the enforcement action.

Ms. Ferrara was unable to verify the tampering complaint. In her inspection of the Hobbs meter, Mr. Ferrara did not inspect the connection lines for evidence of tampering.

Around June 29th, Ms. Ferrara received a phone call from the OSHA investigator, Mr. Clarence Kugler about the whistle blower complaint.

Although previously, an enforcement history had existed concerning Island Express/Safe Air, no enforcement actions were brought against the company from August 1999 through May 15, 2000, while Mr. Peck was Director of Maintenance.

Island Express is an commercial air carrier that flies paying passengers. Consequently, compliance with FAA mandated periodic maintenance inspections is a flying safety factor. In her contacts with Island Express, Ms. Ferrara did not observe much interaction between Mr. Peck as Director of Maintenance and Mr. Gordon as Director of Operations. Although some leeway may be authorized in the timing for some FAA required maintenance work, there is no 10% authorized variation for the regulatory 60 hours maintenance inspections.

The FAA and Ms. Ferrara routinely conduct ramp inspections. Between August 1999 and May 2000, Ms. Ferrara had conducted about half a dozen inspections of the Island Express aircraft. Consequently, her arrival on May 15th to conduct a ramp inspection of the Island Express aircraft would not indicate that she had received a call from Mr. Peck. Ms. Ferrara did not tell anyone at Island Express that Mr. Peck had called to make a complaint.

Mr. Melvin Gordon (TR, pages 90 to 125)

Mr. Melvin Gordon was the Director of Operations for Safe Air International, doing business as, Island Express in May 2000; he started working for the company in September 1999 and left in December

2000. In that capacity, Mr. Gordon's responsibility was to coordinate the entire operation of the aircraft, including necessary maintenance. Part of that communication involved providing copies of the aircraft's flight logs to the Director of Maintenance on a daily basis. Around May 10, 2000, Mr. Gordon believes he was supplying Mr. Peck the necessary information through the daily flight logs.

When non-routine maintenance needed to be conducted, Mr. Peck would contact Mr. Gordon. On one occasion, Mr. Gordon, Mr. Peck, Ms. Mayra Horna, owner of Island Express, and the chief pilot, met to discuss the necessity of repairing a landing gear trunnion.

Mr. Gordon did not ever receive a complaint from Mr. Peck about the Hobbs meter. Mr. Gordon did have problems receiving the flight logs in a timely manner. Each day, the pilot would produce the aircraft log sheet in three copies. One copy stayed in the aircraft; one copy went to Mr. Peck as the Director of Maintenance; and, the third copy went to Mr. Gordon as the Director of Operations. Mr. Gordon did not always receive his copy daily.

When the aircraft was not flying, it was either at International Airport or the Fort Lauderdale Executive Airport ("Executive Airport"). Mr. Peck and the maintenance hanger were located at Executive Airport. The aircraft flew passengers out of International Airport. Mr. Peck only had access to the aircraft when it was at Executive Airport, which was about 60% of the time.

Mr. Gordon was not happy with Mr. Peck's performance because he felt left out of the maintenance part of the operation. His relationship with Mr. Peck was not working out. Starting about a month before the termination, Mr. Gordon was locked out of the maintenance hanger half the time and couldn't check the maintenance status board. Mr. Gordon did not inform Mr. Peck, either in writing or verbally, that Island Express was unhappy with his work. Mr. Gordon noted that since he was not a mechanic, he had to rely on Mr. Peck's expertise. At one point, at least two investors were interested in buying out Island Express. He does not recall telling the investors anything about Mr. Peck. Mr. Dave Bettencourt is the owner of the Island Express aircraft. He leases the aircraft (tail number "N108GP") to Island Express. The aircraft flew about 120 hours a month.

As the Director of Operations, Mr. Gordon had a part in the termination of Mr. Peck's services. Mr. Peck had informed the company that the aircraft needed new cylinders, with an associated cost of $6,000 to $7,000. Just a month prior, Mr. Peck had replaced some of the aircraft's twelve cylinders. Since it was unusual to replace cylinders so soon, Mr. Gordon could not believe the aircraft needed cylinders again. So Mr. Gordon suggested having the aircraft inspected by an independent mechanic at Opa-Locka Airport. The aircraft flew in the morning of May 15th from Executive Airport and then the chief pilot flew it to Opa-Locka Airport at the end of the day. The chief pilot informed Mr. Gordon that the FAA found a few write-ups earlier in the day, but they were not in the aircraft discrepancy log.

At Opa-Locka Airport, three mechanics, Mr. Terry McHugh, Mr. Richard Mullen, and his son, informed Mr. Gordon and Mr. Lucian Horna that the cylinders were all within tolerance. Mr. McHugh also

did an overall inspection of the aircraft and found a lot of necessary maintenance had not been performed. In particular, hoses in the engine compartment were frayed. As a result of Mr. McHugh's inspection, Mr. Gordon grounded the aircraft from May 15th to May 19th for the necessary correction of write-ups and repairs. Mr. Peck was not informed of the discrepancies discovered by Mr. McHugh. The company did not want to fly the aircraft back to Executive Airport for his evaluation. In addition, Mr. Peck and Island Express did not see eye to eye. The last time the aircraft flew prior to May 19th was May 15th. Mr. McHugh was hired as the Director of Maintenance after Mr. Peck left.

Based on this experience, Mr. Gordon suggested to Ms. Mayra Horna that she terminate Mr. Peck as the Director of Maintenance. At the time they decided to terminate Mr. Peck, neither Mr. Gordon nor Ms. Horna knew about his FAA complaint. Mr. Gordon only became aware of the FAA complaint a few days before the hearing. Both Ms. Horna and Mr. Gordon had the authority to terminate Mr. Peck. Mr. Peck was informed of the termination by letter.

Mr. Gordon was not aware that the aircraft had overflown a required maintenance inspection phase point. He was surprised to learn of that problem at the hearing.

Mr. Mark Chestnut (TR, pages 126 to 135)

Mr. Mark Chestnut, who has extensive experience with commercial aviation, was called in as a consultant by an individual interested in buying Island Express. From the end of February 2000 through April 2000, Mr. Chestnut evaluated the Island Express operation and he determined the company had several problems. Notably, the company was poorly managed and under-financed. Due to the financial situation, Island Express had difficulty obtaining aircraft parts and failed to pay its hanger rent. An offer was made to the principal shareholder of Safe Air International to buy Island Express. Mr. Lucian and Ms. Mayra Horna would remain, but the company would come under new management. Mr. Peck seemed anxious to see the buy-out completed. At that time, he appeared to be buying the aircraft parts and providing the maintenance labor. The offer included the payment of $15,000 in back hanger rent. Mr. Chestnut found the process frustrating and eventually the offer was withdrawn.

Mr. Gregory Peck (TR, pages 135 to 147)

Mr. Gregory Peck is Mr. Peck's son. He works with his father at All Aerotech. When his father started working for Island Express in August 1999, Mr. Gregory Peck was a part-time employee for Island Express. At times, he had problems getting his pay from Island Express. Later, he worked for All Aerotech.

The maintenance status board displays the Hobbs time for aircraft and the associated required maintenance due times. To get accurate flight times, they needed to see the flight log in the aircraft. Other than periodic maintenance two or three times a month, the Island Express aircraft was not at Executive Airport.

Mr. William Peck occasionally locked the maintenance hanger door when the aircraft was not present because they were performing other All Aerotech work and Mr. Gordon kept "bugging" them. In addition, All Aerotech owned all the equipment and aircraft parts in the hanger. All Aerotech works on about twelve aircraft. Another lock was placed on the door only after Island Express terminated Mr. Peck.

From the first month they occupied the hanger at Executive Airport, Island Express had problems paying the rent.

About the beginning of May 2000, a problem developed getting the correct Hobbs time. The aircraft flew during the day and then parked for the night at International Airport. When that occurred, the chief pilot was suppose to drive to Executive Airport and drop off a copy of the flight log. But, that usually didn't happen. Due to the friction between Mr. Peck and Island Express, Mr. Gregory Peck was not surprised when his father was let go.

Mr. David Bettencourt (TR, pages 148 to 181)

Mr. David Bettencourt owns the aircraft leased to Island Express, which is the only aircraft presently operated by the company. He purchased the airplane in 1995 while it was still in service with Island Express. With an airframe and powerplant FAA license, he is very familiar with aircraft maintenance. Initially, in his dealings with Island Express, he relied on the accounting and flight logs of the company. Flight time is recorded by a Hobbs meter which is activated by a switch in the landing gear when the aircraft leaves the ground. The Hobbs circuitry contains a switch which can be disconnected. On the aircraft flight log, they typically just record starting and ending Hobbs time for each day to record total time flown that day.

Due to the financial difficulties of Island Express, Mr. Bettencourt eventually had some complicated accounting issues with the company. During a relocation of the company, he had a difficult time obtaining an accurate reading of the aircraft's flight time. The records were slow in coming and sometimes he would call Mr. Peck to obtain the aircraft's flight time. Around February 2000, he became concerned that over the prior two years1200 flying hours appeared to have been unaccounted and lost. This issue caused friction between Mr. Bettencourt and Island Express to the point that they didn't speak much to each other, and he had to turn to Mr. Peck for information. Eventually, Island Express did give him all the requested information and they have tried to sort out the problem.

Mr. Bettencourt was unable to really identify CX 16, a list of discrepancies. He had heard some concerns from Island Express about the maintenance work performed by Mr. Peck. Specifically, they were questioning Mr. Peck's approach in correcting a landing gear problem in February 2000 and asked Mr. Bettencourt whether there was a more economical repair. Mr. Bettencourt indicated he would have corrected the gear problem in a different manner, but deferred to Mr. Peck since he was the Director of Maintenance. Mr. Bettencourt acknowledged that, if the Director of Maintenance is not informed of a problem, then the operator of the aircraft bears the responsibility for its airworthiness. He is not aware of

the specific reason Mr. Peck was terminated. While Mr. Bettencourt has heard that the aircraft's Hobbs meter may have been tampered with and there had been a flight time accountability problem, he did not have any "first hand" that anyone had tampered with the meter.

Respondent's Case

Documentary Exhibits

RX A - Maintenance release, dated September 17, 1999, for a build up and overhaul of six cylinders on one engine.

RX B - Inspection reports for seven cylinders (numbers 36264 through 36270 on aircraft N108GP) for low compression, dated March 8, 2000, indicating the cylinders were deglazed.

RX C - A bill to All Aerotech for $723.29, dated January 25, 2000, from Air Mark Overhaul for two repaired cylinder assemblies. A bill to Island Express/Safe Air, dated March 8, 2000, from Certified Engines Unlimited for the inspection and repair as necessary of eight cylinders on the right engine of aircraft N108GP. The parts cost over $3,000 and the accompanying labor was $660.

RX D - Portions of a maintenance log showing a replace and repair of some aircraft cylinders and a 180 hour phase inspection on March 9, 2000, with a Hobbs meter reading of 5845.9 hours. On March 22, 2000, Mr. Peck accomplished a 60 hour phase inspection with the Hobbs meter showing 5901.7 hours. On April 5, 2000 another phase inspection was conducted with the Hobbs meter showing 5960.1 hours.

RX E - Three pages of the aircraft flight and maintenance log for aircraft number N108GP, dated May 15, 2000. The first page shows a starting Hobbs time of 6177.2 hours and an ending Hobbs meter reading of 6179.6 hours, for a total flight time of 2.4 hours. The aircraft made three scheduled flights between 7:10 a.m. and 11:02 a.m. for a total of 2.2 hours and one maintenance trip lasting 0.2 hour at 2:55 p.m. The first page also contains several mechanical deficiencies and the last two pages contain the listing of mechanical faults.

One page of the aircraft flight and maintenance log for aircraft number N108GP, dated May 19, 2000. This log page records scheduled flights totaling 6.2 hours. The starting Hobbs time was 6179.6 hours; the ending time is recorded as 6185.6 hours. Mr. Terence McHugh also documented the completion of a 180 phase check and added the annotation, "3.2 hours overflight authorized (10% = 6.0 hours)."

Sworn Testimony

Mr. Lucian Horna (TR, pages 187 to 210)

Mr. Luciano Horna, who has 30 years of commercial aviation experience, is the chief pilot for Island Express. On May 15, 2000, Ms. Ferrara arrived without notice and conducted a ramp inspection of the Island Express aircraft. After the inspection, she and Mr. Horna went to the Island Express ticket counter. He called Mr. Peck because maintenance problems had been identified on the aircraft. Ms. Ferrara also talked to Mr. Peck about the noted discrepancies. He doesn't recall either the exact order of the conversations or other aspects of his conversation with Mr. Peck. At that time, he did not know that Mr. Peck had made a call to the FAA. Mr. Peck did not tell him.

Usually, the FAA inspectors just present their inspection results and leave. However, Mr. Horna typically calls the Director of Maintenance after such an inspection to pass on the information. Mr. Horna believes that after the inspection, he had permission to make one more flight and that Mr. Peck didn't object to the flight.

After the FAA inspection, Mr. Horna took the aircraft to Mr. McHugh at the Opa-Locka Airport because he no longer trusted Mr. Peck. Late one evening prior to May 15th, possibly the night before, and following Mr. Peck's stated a concern that a cylinder on the aircraft had gone bad, he and Mr. Horna conducted a compression check of the engine. Mr. Horna believes the test produced normal. results. In addition, since the aircraft continued to fly without any engine problems and the FAA inspection did not disclose any problem with that cylinder, Mr. Horna lost confidence in Mr. Peck's opinion and was concerned about his safety in the air. Mr. McHugh found sufficient deficiencies to ground the aircraft at Opa-Locka Airport. Prior to the engine cylinder incident, Mr. Horna had not been happy with Mr. Peck's work but he didn't express that opinion to Mr. Peck. Mr. Horna believes he "more or less" told the Director of Operations about his concern for Mr. Peck's work. Despite his concern, he continued to fly the aircraft.

At one time, Mr. Horna had been the owner of Island Express but eventually, around 1993 or 1994, he relinquished control to his sister's husband. His sister is the company's administrator.

Concerning a cylinder order, Mr. Horna did not place the order and doesn't know if the company paid for them. Eventually, after the compression check at Opa-Locka Airport showed no problems with the cylinder, the ordered cylinder was returned to the supplier.

The pilot and Director of Maintenance are responsible for ensuring the airworthiness of the aircraft.

Mr. Terrence McHugh (TR, pages 210 to 248)

Mr. McHugh worked as the Director of Maintenance for Island Express from about May 19th until a couple of months before the hearing. He holds multiple FAA pilot and mechanic licenses, including an inspector's authorization, which he has held for 20 years.

Prior to May 15th, Mr. McHugh was asked by Mr. Gordon and Ms. Horna to look at some of the records for the Island Express aircraft concerning appropriate maintenance. Another mechanic actually brought him the record. Before he could complete that evaluation, Mr. Horna flew the aircraft to him at Opa-Locka Airport on May 15th. Around 7:30 that night, as part of the overall evaluation, and at the request of Mr. Gordon and Ms. Horna, he conducted a compression and power check of the plane's engine. Mr. McHugh informed Mr. Horna that the cylinders were within normal limits (RX E, first page). In fact, at the next scheduled engine overhaul, all the used cylinders were accepted by the supplier because they were within normal tolerances. Initially, he did not know why they asked him for the engine check; but, eventually he was told someone stated a cylinder needed to be replaced. Mr. McHugh replied that someone was trying to scam Mr. Horna.

Based on the condition of the aircraft, a written list of discrepancies, non-grounding deficiencies identified by the FAA (CX 12), and other mechanical problems discovered by Mr. McHugh and another mechanic (CX 16), Mr. McHugh recommended the aircraft be "completely gone over" and recommended that the aircraft not be released for flight other than a ferry trip to another location for further maintenance. At the same time, Mr. McHugh admitted that CX 16 is not a typical discrepancy sheet, since it lacks other information, such as the aircraft number.

He also noted that a required action based on a very complicated FAA airworthiness directive had not been properly documented. Mr. McHugh later discovered the necessary repair had not been accomplished. In addition, upon physical examination of the left engine exhaust, he found that the exhaust was not in compliance with an FAA directive and in a dangerous condition. As a result, he informed Mr. Horna the exhaust had to be removed.

After reviewing the maintenance record, Mr. McHugh told Mr. Gordon that in his opinion the records did not reflect "acceptable maintenance" on the aircraft. In addition, the appearance and condition of the aircraft, including frayed hoses and chaffed connections, did not reflect that regular maintenance had been accomplished. He did not believe the Director of Maintenance for Island Express had been doing a proper job.

Following his evaluation, Island Express asked him to be the interim Director of Maintenance. After a conversation with Ms. Ferrara, he received a fax approving him as the interim director. As the interim director, at the completion of the necessary repairs, Mr. McHugh released the aircraft for flight.

Ms. Mayra Horna (TR, pages 248 to 263)

Ms. Mayra Horna is the secretary, treasurer, and administrative officer of Island Express. Mr. Peck's recommendation in May 2000 that Island Express replace some cylinders on the aircraft made her suspicious because two months earlier the company had replaced eight cylinders on the plane (see RX C). She agreed to send the airplane to Mr. McHugh for an evaluation. But, after Mr. Horna told her that when Mr. Peck and Mr. Horna ran the compression check the cylinders were okay, she concluded that she could no longer trust Mr. Peck. At that time, she decided, with Mr. Gordon, to end their relationship with Mr. Peck. When they made that decision, she did not know he had contacted the FAA.

Mr. Peck was hired around August 1999. She started having problems with him in February 2000 but still trusted him until sometime in May. In May, considering the condition of the aircraft, Ms. Horna told Mr. Peck that she didn't trust him. Around May 13 or 14, All Aerotech called Certified Engines and ordered some cylinders, with Island Express paying the bill.

Around 11 a.m. on May 15th, Ms. Horna was in the company's office at Executive Airport. She doesn't recall when she found out about the FAA ramp inspection because it was routine. Instead, she was concerned about the cylinder change issue.

Mr. Peck is "his own boss." Mr. Gordon, the Director of Operations, reports to Ms. Horna. She told Mr. Gordon on the morning of May 15th to fire Mr. Peck because Mr. Horna had reported that the compression check done the night before had produced normal results. Further, they decided to fly the plane to Opa-Locka Airport to check it out. On the same day, Mr. Peck locked the hanger door.

Prior to February 2000, Mr. Peck received a paycheck. Then, through a verbal contract, she agreed to share a hanger in exchange for a portion of his income while conducting other business in the hanger. According to Ms. Horna, Mr. Peck explained that she could pay her hanger rent based on what he gave her from his business income. When things were not working out, Mr. Peck encouraged her to stay because things would get better. Mr. Peck stated, while remaining the Director of Maintenance, he would be an outside contractor and pay the other mechanics. By May, she was looking for another location because Island Express couldn't afford the hanger rent. During this relationship, Island Express received parts invoices from All Aerotech as an independent contractor.

Mr. Peck didn't receive the letter terminating the relationship on May 15th because he had locked the hanger door. So, she gave the letter to Mr. Gordon who sent it to Mr. Peck. She also provided a copy to Ms. Ferrara informing her that Mr. Peck was no longer the Island Express Director of Maintenance.

Mr. Melvin Gordon (TR, pages 264 to 274)

On the morning of May 15th, at Executive Airport, Ms. Horna told Mr. Gordon that she had decided to terminate their relationship with Mr. Peck because she no longer trusted him in light of the

cylinder repair incident. She gave him the termination letter. But, Mr. Gordon held the letter in order to receive Mr. McHugh's report. As the Director of Operations, he wanted to know the extent of the maintenance problem before delivering the letter. If Mr. McHugh had not discovered some maintenance problems, Mr. Gordon would have asked Ms. Horna to change her mind.

Mr. Gordon does not know how Mr. McHugh got the maintenance records. Earlier on the 15th, due to his concern about the proposed cylinder repair, Mr. Gordon asked another individual for the name of an independent mechanic and he was referred to Mr. McHugh.

Eventually, Mr. Peck released the maintenance records after receiving authorization from Mr. Bettencourt and $1,000.

Mr. Joe Fascigilione (TR, pages 275 to 288)

Mr. Fascigilione worked as the bookkeeper/accountant for Island Express from late 1999 to early 2000. Initially, prior to February 2000, Island Express and Mr. Peck agreed that they would share a hanger and Mr. Peck would pay his share of the rent through a set percentage of the income he produced in this business, All Aerotech. He would also receive a salary as Director of Maintenance for Island Express. Mr. Peck remained on the payroll until February 2000 when financial problems caused the parties to re-negotiate Mr. Peck's compensation. Mr. Fascigilione was actively engaged in the negotiations.

Mr. Peck voluntarily agreed to temporarily exchange his salary from Island Express for his share of the hanger space. In other words, Island Express would no longer pay him a salary and Mr. Peck no longer had to pay his share of the hanger rent. Under this arrangement, Mr. Peck performed maintenance labor in exchange for his space in the hanger. He became responsible of all labor costs, including the employees of All Aerotech. Island Express would reimburse him for the parts. The parties were unable to reach a written agreement about this arrangement, but after February 2000, Mr. Peck was no longer on the Island Express payroll.

Mr. Fascigilione sensed a persistent mistrust between the parties about the aircraft repairs. Since Island Express had only one plane, there was always an effort to keep it flying. The aircraft logged between 100 to 200 hours a months. The company continued to have cash flow problems.

Mr. Fascigilione also participated in the failed buy-out attempt. Mr. Peck did not hinder that process in any manner. The investors paid the hanger rent for the last three months.

Mr. Fascigilione was also involved in the attempt to reconcile the flying hours on the aircraft. Apparently, a difference developed between the time recorded in the flight log and the Hobbs meter time. He attributes the problem to a lack of internal controls.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Probative Weight Findings

Prior to rendering specific findings of fact in this case, I need to address the relative probative of the sworn testimony presented by three witnesses.

First, while some of Mr. Lucian Horna's testimony concerning the compression check of the aircraft's cylinders prior to May 15th was credible and corroborated by another witness,[9] most of his remaining testimony involving his action on May 15th has diminished probative value. During the cross examination by Mr. Peck, Mr. Horna's barely subdued hostility towards Mr. Peck clearly adversely affected his ability to function as a reliable witness. For example, despite persistent questioning by Mr. Peck about their important telephone conversation the morning of May 15th after the FAA inspection, Mr. Horna, who acknowledged the conversation occurred, seemed unable to recall much of anything about their discussion (TR, pages 191 to 193).

Next, I have considered whether the fact that Mr. McHugh, after his May 15th inspection of the Island Express aircraft and its maintenance record, supplanted Mr. Peck as the Island Express Director of Maintenance tainted his testimony at the hearing. Upon consideration of his testimony as a whole, including Mr. Peck's cross-examination and Mr. McHugh's open and apparently candid demeanor on the witness stand, I find he was a credible witness even in light of his role as the successor Director of Maintenance. I also note that by the time of the hearing, Mr. McHugh was no longer the company's Director of Maintenance.

Finally, Ms. Horna demonstrated strong hostile feelings towards Mr. Peck, but despite her agitation, she` answered questions without equivocation and appeared credible.

Specific Findings

Based on the documents in the record and the probative sworn testimony, I make the following findings of fact.

July 31, 1999 – Mr. William H. Peck becomes the Director of Maintenance for Safe Air International, Inc., doing business as Island Express (CX 1 and CX 9). Mr. Peck receives a weekly salary from Island Express of $1,000 (CX 2). Island Express is a commercial air carrier that flies paying passengers. As such, the company's aircraft is subject to periodic maintenance inspections under FAA regulations. Accomplishment of these inspection relates to flying safety (Ms. Ferrara' testimony). Mr. David Bettencourt owns the company's aircraft, N108GP, and leases it to Island Express (Mr. Gordon's

[9]Even the manner of Mr. Peck's questioning concerning their accomplishment of a cylinder check prior to May 15th indirectly supported Mr. Horna's responses that he witnessed the compression check

and Mr. Bettencourt's testimony). The aircraft averages about 120 flying hours a month (Mr. Gordon's testimony, as partially supported by Mr. Fascigilione's testimony). Earlier to this time, Mr. Bettencourt had noticed discrepancies in the accounting of the aircraft's total flight time (Mr. Bettencourt's testimony).

Although Island Express hired Mr. Peck, he remained his own boss (Ms. Horna's testimony). At the time Mr. William Peck starts working for Island Express, his son, Mr. Gregory Peck, becomes a part-time employee of Island Express. At some unspecified time later, Mr. Gregory Peck stops working for Island Express and becomes an employee of All Aerotech (Mr. Gregory Peck's testimony).

August 1999 to May 2000 – Ms. Jean Ferrara, an FAA maintenance inspector, conducts about half a dozen ramp inspections of the Island Express Aircraft (Ms. Ferrara's testimony).

September 1999 – Mr. Melvin Gordon becomes the Director of Operations for Island Express (Mr. Gordon's testimony).

Six cylinders on the Island Express aircraft are overhauled (RX A).

October 1999 – Following the company's loss of maintenance facilities at International Airport, Mr. Peck and Island Express agree to share a hanger at Executive Airport. To facilitate the move to the new hanger, Mr. Peck loans Island Express $5,000, which is eventually paid back (CX 8, CX 9, and CX 14). During this period, his weekly salary from Island Express remains $1,000 (CX 1 and CX 8).

November 1999 – Through a verbal agreement, the parties begin sharing a maintenance hanger at Executive Airport (CX 9). As his share of the hanger rent, Mr. Peck, while remaining Island Express' Director of Maintenance and receiving a salary from Island Express, doing business as All Aerotech, and performing maintenance on about twelve airplane (Mr. Gregory Peck), agrees that All Aerotech will pay Island Express a third of the revenue the company generates in the hanger (CX 3 and CX 9, Ms. Horna's and Mr. Fascigilione's testimony). Island Express continues to conduct its flight operations out of International Airport (Mr. Gordon's testimony). From the very beginning of the lease, Island Express has problems paying the monthly rent for the hanger (Mr. Gregory Peck's testimony).

December 1999 and January 2000 – Mr. Peck receives pay from Island Express. The pay stubs show employee withholding and deductions for federal, social security, and medicare taxes (CX 8).

February 2000 – Mr. Peck receives his last pay from Island Express as of February 10, 2000; deductions are made for employee social security and medicare taxes (CX 8). Due to Island Express' financial problems, the parties verbally re-negotiate Mr. Peck's compensation. Mr. Peck agrees to remain the Director of Maintenance but Island Express no longer pays him a salary. In exchange for his maintenance of the Island Express aircraft, the company agrees to pay his share of the hanger rent (Mr. Fascigilione's testimony). Mr. Peck assumes responsibility for all labor costs, including the employees of All Aerotech (Ms. Horna's, Mr. Fascigilione's and Mr. Gregory Peck's testimony).

About this time, one or two investors become interested in acquiring Island Express (Mr. Gordon's testimony). In light of this potential buy-out, Mr. Peck agrees to stay on as the Director of Maintenance without a weekly salary. He is to be compensated in the future after the take-over (CX 8).

In trying to reconcile actual flight time with time on the company's books, Mr. Bettencourt discovers a significant shortfall in the amount of accountable hours (Mr. Bettencourt's testimony). Island Express expressed to Mr. Bettencourt some concern about Mr. Peck's proposed maintenance to one of the plane's landing gears (Mr. Bettencourt's testimony).

March 8 and 9, 2000 – Required inspection is completed and maintenance is accomplished on eight of the Island Express aircraft's cylinders with an associated cost of over $3,000 (RX C). The Hobbs meter reading is about 5846 hours (RX D).

March 22, 2000 – Required maintenance phase inspection is completed; the Hobbs meter reads 5901.7 hours (RX D).

April 5, 2000 – Required maintenance phase inspection is completed; the Hobbs meter records 5960.1 hours (RX D).

Spring 2000 – Island Express is only operating one aircraft, a Cessna 402C. All parties strive to keep the income producing aircraft flying. Mr. Peck encourages Ms. Horna to keep Island Express in their shared hanger (Ms. Horna).

March to April 2000 – During this period, Mr. Mark Chestnut, on behalf of a potential investor, evaluates Island Express and notes financial problems. In particular, Island Express has failed to pay its hanger rent. In attempt to facilitate a buy-out, the investor pays $15,000, representing three months of over due hanger rent for the benefit of Island Express (Mr. Chestnut's and Mr. Fascigilione's testimony). Eventually, the buy-out attempt fails (Mr. Fascigilione's testimony).

May 3, 2000 – Mr. Peck performs maintenance on the company's Cessna 402 C (CX 1 and CX 9). The Hobbs meter reading at that time is 6122.7 hours (CX 13). Around this time, the pilot of the Island Express aircraft became unreliable in delivering copies of the daily flight log to Mr. Peck (Mr. Gregory Peck's testimony).

May 10, 2000 – The Hobbs meter reading is 6164.7 hours (Ms. Ferrara's testimony).

May 4, 2000 to May 14, 2000 – Sometime during this period, based on his knowledge of the aircraft's average use, Mr. Peck becomes concerned about the aircraft's next scheduled maintenance inspection (CX 3), which is due at 6182.7 hours of flight time (CX 13). He informs the company's Director of Operations, Mr. Mel Gordon , that the aircraft's next required maintenance inspection will be due in mid-May. He attempts to obtain the aircraft's flight time from Mr. Mel Gordon, but is unsuccessful

(CX 1 and CX 3). Mr. Gordon is also experiencing problems receiving daily flying logs from the company's pilot. He believes that Mr Peck is leaving him out of the maintenance part of the company's operation; on occasions, he is locked out of the maintenance hanger. Their working relationship is deteriorating (Mr. Gordon's testimony).

By May 2000, the hanger sharing arrangement between Island Express and Mr. Peck is not working out. Ms. Horna starts looking for another hanger area because Island Express can no longer afford the rent (Ms. Horna's testimony).

Sometime during the later part of this period, Mr. Peck indicates that at least one of the aircraft's cylinder's is going bad. The chief pilot, Mr. Lucian Horna, asks to witness a cylinder compression check. The test produces normal results (Mr. Horna's testimony). Ms. Horna begins to lose confidence in Mr. Peck based on his recommendation about replacing a cylinder because cylinder work had been accomplished on the aircraft just two months prior. After Mr. Horna informed her that the compression test of the cylinders was normal, Ms. Horna concludes Island Express can no longer trust Mr. Peck as the Director of Maintenance. She agrees to send the aircraft to an independent mechanic for an inspection (Ms. Horna's testimony).

May 15, 2000 – Early morning, Mr. Peck calls the FAA regional maintenance inspector, Ms. Jean Ferrara, (CX 1 and CX 3) and registers two complaints (Ms. Ferrara's testimony). First, Mr. Peck suggests that someone may be tampering with the Hobbs meter on the Island Express aircraft (Ms. Ferrara's testimony). Second, Mr. Peck believes the company may be flying the aircraft past its next mandatory maintenance inspection. The aircraft had 6164.7 hours on May 10th, it's next inspection under FAA regulations was due in about 18 more flight hours and the aircraft averaged about 6 hours of flying time each day (Ms. Ferrara' testimony).

At the start of the day the aircraft's Hobbs meter reads 6177.2 hours. Between 7:10 a.m. and 11:02 a.m. the aircraft makes three scheduled flights totaling 2.2 flying hours. At 2:55 p.m. the aircraft makes another 0.2 hour maintenance flight. The Hobbs meter reading at the end of the flying day is 6179.6 hours (RX E).

Around 11:00 a.m., in response to Mr. Peck's complaint, Ms. Ferrara and another FAA inspector conduct a no-notice ramp inspection at International Airport of the Island Express aircraft (CX 3, CX 9 and Ms. Ferrara's testimony). About the same time, Ms. Horna learns of the ramp inspection; she considered the inspection routine and is not informed that the inspection was prompted by Mr. Peck's complaint (Ms. Horna's testimony). The two FAA inspectors find several mechanical discrepancies unrelated to Mr. Peck's complaint (CX 3 and Ms. Ferrara's testimony). The inspected Hobbs meter reading, which matches recorded time in the flight log, is 6177.2 hours. They do not find evidence of Hobbs meter tampering (Ms. Ferrara's testimony).

Following the inspection, and though somewhat unusual, Ms. Ferrara speaks with Mr. Peck, as the company's Director of Maintenance, from a phone located in the company's ticket office. She gives Mr. Peck the Hobbs meter reading and describes the problems with the aircraft (CX 3 and Ms. Ferrara's testimony). Ms. Ferrara does not tell anyone at Island Express that Mr. Peck's complaint prompted her inspections. Mr. Horna, the company's chief pilot, is present during the conversation. He also speaks with Mr. Peck and explains the inspection findings. Mr. Peck tells Mr. Horna to fly the airplane to him at Executive Airport for the necessary repairs (CX 3 and). While in the Island Express ticket office, Ms. Ferrara also calls the company's Director of Operations, Mr. Gordon, and informs him of the maintenance problems. (Ms. Ferrara's testimony).

Sometime during this day, due to the unease about Mr. Peck's recommendation about another cylinder change, Mr. Gordon obtains a reference to Mr. Terrence McHugh who works at Opa-Locka Airport (Mr. Gordon's testimony). Also, during the day, concerned about the normal cylinder compression check results following Mr. Peck's recommendation for a cylinder change, Ms. Horna tells Mr. Gordon to fire Mr. Peck because she no longer trusts him (Ms. Horna's and Mr. Gordon's testimony). Additionally, on May 15th, Mr. Peck locks the hanger door (Ms. Horna's testimony). Consequently, Ms. Horna is not able to deliver the termination letter to Mr. Peck. Instead, she gives the letter to Mr. Gordon to send to Mr. Peck (Ms. Horna's and Mr. Gordon's testimony). Ms. Horna also sent a copy of the termination letter to Ms. Ferrara (Ms. Horna's testimony).

At the end of the business day, Ms. Horna and Mr. Gordon decide to fly the company's aircraft to Mr. McHugh for an inspection (Ms. Horna's and Mr. Gordon's testimony).

Mr. McHugh and a couple mechanics inspect the aircraft and conduct an engine compression test. The test shows all the cylinders are within normal limits. In addition, the mechanics find other maintenance deficiencies. The aircraft is grounded pending Mr. McHugh's repair of the identified problems. Mr. McHugh tells Mr. Gordon that the maintenance on the aircraft has not been acceptable. Island Express asks Mr. McHugh to become its Director of Maintenance. At this time, Mr. Gordon did not know Mr. Peck had made a complaint to the FAA. (Mr. Gordon's testimony and Mr. McHugh's testimony).

May 17, 2000 – Island Express receives a warning that it faces eviction from the hanger for overdue rent in the amount of $5,000 (CX 9).

Island Express and Mr. Peck sign a memorandum in which Island Express agrees to vacate the Hanger Number 2 at Executive Airport by the end of May 31, 2000 (CX9 and CX 17) and pay Mr. Peck $1,000 (Mr. Gordon's testimony). In return, Mr. Peck agrees to turn over the maintenance records for the company's plane to Mr. Gordon (CX 9). All Aerotech bills Island Express over $31,000.

Mr. Peck receives a letter from Ms. Mayra Horna, dated May 15, 2000, informing him that his services as Director of Maintenance for Island Express are terminated (CX 1, CX 3, CX 9, CX 15, and Ms. Horna's testimony).

May 18, 2000 – Island Express receives notice of a lien to be imposed for overdue hanger and fuel bills. Mr. Peck is able to lease the hanger on the condition that Island Express vacate the premises (CX 9).

May 19, 2000 – At the start of the day, the Hobbs meter on the Island Express aircraft is 6179.6 hours. The aircraft makes several scheduled trips totally 6.2 hours. At the end of the day, the Hobbs records total flying hours as 6185.6 (RX E).

Mr. McHugh, at the Opa-Locka Airport, completes the next FAA required maintenance inspection on the Island Express aircraft. The Hobbs meter reads 6185.8 hours, representing an overflight 3.1 hours past the required inspection time of 6182.7 hours (CX 13). In the flight log, he annotates that an overflight of 6 hours, as 10% of the 60 hour phase, is "authorized" (RX E). However, the FAA does not permit overflight of the 60 hour phase inspections (Ms. Ferrara's testimony).

May 15 to May 22, 2000 – Ms. Ferrara continues her investigation of Mr. Peck's complaints. She determines that as of her May 15th inspection, the Island Express aircraft had not overflown its required inspection time of 6182.7 hours. In reviewing information about the aircraft's flights from U.S. Custom records, Ms. Ferrara is unable to establish that the aircraft, on the day of inspection, had overflown the inspection time. About May 22, 2000, Ms. Ferrara receives notice from Mr. Terrence McHugh that on May 19th, when he accomplished the required maintenance inspection, the aircraft had overflown the inspection by 3.1 hours. Consequently, Ms. Ferrara initiates an enforcement action against Island Express (Ms. Ferrara's testimony).

August 7, 2000 – In his letter to the OSHA investigator, Mr. Peck seeks as a remedy from the alleged AIR 21 whistle blower violation his back wages, wages for employees who serviced the Island Express aircraft and reimbursement for installed parts in the amount of $31,880.31(CX 3).

August 15, 2000 – Mr. Peck, as President of All Aerotech, places a corporate mechanic's lien on the Island Express aircraft for installed parts and labor (CX 5 and CX 9).

September 13, 2001 – FAA notifies Mr. Peck that his complaint established a violation of an FAA order, regulation, or air carrier safety standard. The FAA indicates an intention to take corrective or enforcement action.

Issue No. 1 - Employee Status

According to the provision of AIR 21, an air carrier, its contractors, or subcontractors, may not discriminate against an employee. Due to the arrangement that existed between Mr. Peck and Island

Express in mid-May 2000, a threshold, jurisdictional,[10] issue arises as to whether Mr. Peck was an employee of Island Express at the time of his complaint to the FAA such that he may invoke the employee protection provisions of the statute.

The statute, AIR 21, does not define the term "employee." When a federal statute fails to define "employee," the United States Supreme Court indicated in *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992), that the conventional master-servant relationship as defined by common-law agency doctrine is applicable. In *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y Apr. 3, 1995), the Secretary of the U. S. Department of Labor ("Secretary") applied the high court's analysis to whistle blower cases, rather than the advocated, more expansive, test involving economic realities.

The multiple common law considerations highlighted by the Supreme Court include: a) hiring party's right to control the manner and means of the work accomplished by the hired party; b) skill required and source of instruments and tools; c) location of the work; d) duration of the relationship between the parties; e) right of the hiring party to assign additional work to the hired party; f) extent of the hired party's discretion over the timing of the work; g) method of payment; h) hired party's role in hiring and paying assistants; i) whether work is part of the regular business of the hiring party; j) the provision of employee benefits; and, k) the tax treatment of the hired party.

With these factors in mind, I first find that prior to February 2000, Mr. Peck was an employee of Island Express. From the fall of 1999 till February 2000, although independently controlling the manner, methods and means of the Island Express aircraft's maintenance, Mr. Peck received a weekly salary from Island Express as its Director of Maintenance. Island Express also withheld various federal taxes from his pay. In addition, Island Express, directly paid at least one of Mr. Peck's assistants, Mr. Gregory Peck. I consider this financial enmeshment between the two parties, despite the distinctive and seemingly independent nature of Mr. Peck's aircraft maintenance from Island Express' flying business, sufficient to establish an employer-employee relationship.

After February 2000, due to Island Express' financial problems, the employment relationship between Mr. Peck and Island Express became very murky. Mr. Peck still remained the company's Director of Maintenance and by May 2000 had accomplished maintenance on the company's aircraft for at least nine months. He still performed his maintenance work on the aircraft in the hanger shared with Island Express and had little control over when the aircraft would be brought to him for maintenance.

On the other hand, Mr. Peck was engaged in highly specialized work and continued to generally control the manner, methods and means of his maintenance on the company plane. His maintenance on the Island Express aircraft was only a part of the work accomplished in the hanger by his company, All Aerotech. Island Express clearly had no authority to assign him other maintenance work and Island

[10] *See Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y Apr. 3, 1995).

Express was engaged in the business of flying and not maintenance. While Mr. Peck, through All Aerotech accomplished maintenance on several other aircraft besides the Island Express plane. Additionally, after February 2000, Mr. Peck became responsible for the pay of his All Aerotech employees who worked on the Island Express plane. For example, Mr. Gregory Peck, who had previously been paid by Island Express, became an employee of All Aerotech and began to receive his pay from All Aerotech. Notably, even Mr. Peck referred to the arrangement between Island Express and All Aerotech at this point as a "business relationship" (CX 1). Finally, while arguably, Island Express still paid Mr. Peck in the form of free hanger space rather than a weekly salary, Island Express no longer retained Mr. Peck on its payroll. As a result, Island Express no longer withheld federal taxes on behalf of Mr. Peck. Even considering the free hanger space as a salary is problematic since Island Express failed to pay rent on the hanger and was clearly in arrears on hanger rent by May 2000.

On balance, evaluating the multiple, conflicting factors associated with the parities' relationship in May 2000, I find the preponderance of the elements supporting independent contractor status sufficiently outweigh the remaining vestiges of employee status. In particular, the severance of the weekly salary arrangement and corresponding tax treatment between Mr. Peck and Island Express sufficiently tilted the scale to the extent the Mr. Peck's employment status with Island Express was fundamentally altered. Starting in February 2000, and specifically on May 15, 2000, Mr. William Peck, doing business as All Aerotech, worked as an independent maintenance contractor for Island Express.

I have also considered whether Mr. Peck, even as an independent contractor, may still be protected by AIR 21 as a former employee of Island Express. However, the various exceptions that permit a former employee to proceed with a whistle blower complaint appear to be inapplicable in this case.[11] At the time of his May 15, 2000 complaint to the FAA, Mr. Peck was an independent contractor of Island Express. His discrimination complaint relates to this termination as the Director of Maintenance in May 2000 and neither relates to, nor arises out of, his earlier employer-employee relationship with Island Express that existed from September 1999 to February 2000. Likewise, Mr. Peck's complaint of discrimination touches neither intermittent employment with Island Express nor interference with prospective employment. Finally, Mr. Peck's case does not involve subsequent participation in whistle blower proceedings.

In summary, at the time he made his complaint to the FAA on May 15, 2000, Mr. Peck was not an employee of Island Express. Consequently, as an independent contractor, rather than an Island Express employee, he is unable to invoke the employee whistle blower provisions of AIR 21.

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[11] *Flanagan v. Bechtel Power Corp.*, 81-ERA-7 (Sec'y June 27,. 1996) and *Chase v. Buncombe County, N.C.* (intermittent employment with alleged discriminating company); *The Connecticut Light & Power Co. v. Secretary of the United States Dept. of Labor*, No. 95-4044 (2d Cir. May 31, 1996) (available at 1996 U.S. App LEXIS, 12583) (case below 89-ERA-38) (discrimination arose out of, or was related to, an employer-employee relationship); *Garn v. Toledo Edison Co.*, 88-ERA-21 (Sec'y May 18, 1995) (interference with prospective employment); and *Grizzard v. Tennessee Valley Auth.*, 90-ERA-52 (Sec'y Sept. 26, 1991) (discrimination based on subsequent participation in a whistle blower proceeding.)

Elements and Burden of Proof[12]

Since Mr. Peck has failed to establish that he was an employee of Island Express at the time he made his call to the FAA inspector, his retaliatory discrimination complaint under AIR 21 fails. However, for the sake of completeness and to provide a hopefully complete and informative opinion to both parties, I will proceed to the next issue.

Prima Facie Case

Due to the recent implementation of the AIR 21 employee whistle blower provisions, neither regulations nor judicial precedent are available as guides for adjudicating Mr. Peck's complaint that Island Express violated the employee discrimination prohibition in AIR 21. Consequently, I turn to adjudicatory scheme established for nuclear and environmental whistle blower cases which are adjudicated under 29 C.F.R. Part 24.

In such cases, the complainant has an initial burden of proof to make a *prima facie* case by showing (1) the complainant engaged in a protected activity; (2) the respondent knew the employee engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and, (4) circumstances are sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable personnel action. 49 U.S.C. §§ 42121 (a) (1) to (4), and (b) (2) (B) (i) and (iii), 29 C.F.R. §24.5 (b) (2) (i) to (iv), and *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

Respondent's Burden to Produce Evidence

If the complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action (an illegitimate motive caused the personnel action), the respondent then has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. §§ (b) (2) (B) (ii) and (iv), and 29 C.F.R. §24.5 (c) (1). In other words, the respondent may avoid liability due to the establishment of a *prima facie* case by producing sufficient evidence that clearly and convincingly shows a legitimate purpose or motive for the personnel action. *See Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and

[12]I recognize the Administrative Review Board's position that in a fully litigated case in which the respondent presents evidence of a legitimate motive for the personnel action the analysis of a *prima facie* case serves no analytical purpose because the final decision will rest on the complainant's ultimate burden of proof. See *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998) and *Carter v. Electrical District No. 2 of Pinal*, 92-TSC-11 (Sec'y Jul. 26, 1995). However, despite some duplication of effort, I find that working through the *prima facie* elements useful since the ultimate burden of proof still involves many of the elements covered in the *prima facie* analysis. In addition, if the complainant, even in a fully litigated hearing, fails to establish an element of the *prima facie* case, the question of an ultimate burden of proof has also been decided.

convincing," that evidentiary standard falls between preponderance of the evidence and beyond a reasonable doubt. *Yule* at 4.

Complainant's Ultimate Burden of Persuasion

If the respondent successfully produces clear and convincing evidence of a legitimate motive for the personnel action, then the focus returns to the complainant's ultimate burden of proof to demonstrate that the respondent's stated legitimate reason is pretext. In reviewing the numerous cases on the shifting burden of production and the ultimate burden of proof, the United States Court of Appeals for the Eight Circuit in *Carroll v. USDOL*, 78 F. 3d 352, 356 (8th Cir. 1996) (case below *Carroll v. Bechtel Power Corp.*, 91-ERA 46 (Sec'y February 15, 1995)) observed:

> But once the employer meets this burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (applying *McDonnell Douglas* test) (footnote omitted); see also *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (applying *McDonnell Douglas* test). The *Couty/McDonnell Douglas* framework and its attendant burdens and presumptions cease to be relevant at that point, *Hicks*, 113 S. Ct. at 2749, and the onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. *Burdine*, 450 U.S. at 256. While *Couty* allows the complainant to shift the burden of production to the employer by establishing a prima facie case, the ultimate burden of persuasion remains with the complainant at all times. *Hicks*, 113 S. Ct. at 2747; *Burdine*, 450 U.S. at 253.[13]

At this point of the analysis, the fact the complainant had established a *prima facie* case becomes irrelevant. Instead, the trier of fact must determine the ultimate issue, whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against him or her for engaging in an protected activity. *Carroll* at 356.

Issue No. 2 - Protected Activity

As mentioned above, the first requisite element for a *prima facie* case is a protected activity. The Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations" *Minard v. Nerco Delamar Co*., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143

[13]The citation for *Couty* case is *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989).

F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

The implied purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving or relating to violations of any FAA order, regulation, or standard concerning air carrier safety also affects the scope of protected activity. 49 U.S.C. § 42121 (a) (1). The Supreme Court noted in a parallel statute, that the statute's language must be read broadly because "[a] narrow hyper technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raised safety concerns. *Kansas Gas & Electric Company*, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986). Such statutes have a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). As a results, the courts and the Secretary have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. *See* S. Kohn, *The Whistle Blower Litigation Handbook*, pp. 35-47 (1990).

Although the above principles were developed in environmental whistle blower cases, the underlying purposes for the whistle blower protections and principles are readily adaptable to Mr. Peck's case. Consequently, a protected activity under AIR 21 has two elements. First, the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable.

From the facts presented in this case, Mr. Peck engaged in two actions which may be considered protected activity under AIR 21. First, on the morning of May 15, 2000, he informed Ms. Ferrara that the Hobbs meter of the Island Express aircraft may have been subjected to tampering. Second, in the same conversation, Mr. Peck expressed his belief that Island Express may be flying its aircraft beyond the next FAA regulatory-required phase inspection.

If proven true, both these allegations would have been violations of FAA air carrier safety regulations or adversely affected airworthiness. Aircraft flying time is utilized to regulate and ensure periodic and FAA-mandated maintenance inspections of air carrier aircraft. As a result, any tampering with the Hobbs meter recording of flying time may adversely affect air safety. Likewise, the failure to accomplish the periodic inspections on time also raises an air safety concern. As a result, Mr. Peck has established the first element of a protected activity because both his complaints specifically and definitively relate to the airworthiness of the Island Express aircraft and the safe transportation of passengers by this air carrier.

Having determine both allegations concern air safety, I must next decide whether Mr. Peck's belief in those two allegations was objectively reasonable. Turning first to the Hobbs meter tampering assertion, and noting the complete absence of any evidentiary testimony or statement from Mr. Peck explaining the foundation for this complaint, I find an insufficient evidentiary basis in the record to conclude that Mr. Peck had a reasonable basis for this complaint.

In the years prior to May 2000, Mr. Bettencourt and Island Express had an issue concerning the accuracy of the aircraft's reported flying time. But, while many explanations were possible, including inaccurate readings from a tampered Hobbs meter, Mr. Fascigilione opined that irregular accounting was the most likely cause for the flying hour discrepancies. Mr. Bettencourt himself could not state that tampering of the Hobbs meter had occurred. Then, around May 2000, Mr. Peck did experience problems obtaining accurate flight times from Mr. Horna and Mr. Gordon. However, that difficulty was indicative of poor communications and a deteriorating business relationship rather than a tampered Hobbs meter. Additionally, Ms. Ferrara's May 15th inspection of the Hobbs meter showed no signs of tampering. Her independent reconciliation of the aircraft's flying hours and U.S. Customs logs did not provide any evidence reflective of tampering with the flying time meter. On the whole, while Mr. Peck no longer trusted the individuals who operated Island Express, apparently believed they were capable of tampering with aircraft recording equipment, and established that such tampering was physically feasible, he has failed to provide sufficient evidence to demonstrate that his complaint to the FAA that the Island Express aircraft may have a tampered Hobbs meter was objectively reasonable.

In regards to Mr. Peck's allegation of overflying of the Island Express aircraft's next required maintenance inspection, I reach a different conclusion. Several factors came together by May 15, 2000, to render Mr. Peck's expressed concern to the FAA that the Island Express aircraft may be overflying its next required maintenance inspection objectively reasonable. First, according to the testimony, the Island Express airplane usually averaged about 120 flying hours per month, or about four hours a day. Second, between May 3, 2000 (Hobbs meter reading of 6122.7 hours) and May 10, 2000 (Hobbs meter reading of 6164.7) the aircraft flew a total of 42 hours for a daily average of six hours a day, exceeding the usual 4 hours a day average. Third, after Mr. Peck completed a maintenance inspection on May 3, 2000, and in light of the Hobbs meter reading of 6122.7 hours, he knew that the next required maintenance inspection by a Hobbs reading of 6182.7 hours, or another 60 flying hours. Accordingly, based on the historical average daily flying time, the aircraft would then be ready for another inspection in fifteen more days, or about May 18th. Third, however, when Mr. Peck finally obtained a Hobbs meter reading on May 10, 2001, the total of 6164.7 hours represented a increased average of six flight hours a day.[14] With this accelerated rate of use, the aircraft would be due another inspection in three days (18 more flying hours), or May 13th. Fourth, for numerous reasons, including the fact that Island Express conducted its flight operations at a different airport and the apparent reluctance of Mr. Gordon and Mr. Horna to provide copies of the daily flying log, Mr. Peck was not receiving daily flying time reports for the aircraft.

[14]The May 10 reading of 6164.2 hours minus the May 3 reading of 6122.7 hours, divided by 7 days equals 6 hours a day.

Since Mr. Peck received his most recent Hobbs meter reading of 6164.7 on May 10th, and the aircraft was then averaging six flight hours a day, by May 15th, his concern about an overflight of the aircraft beyond its next phase inspection was both real and reasonable.

In determining that Mr. Peck's second complaint was reasonable, I have considered that Ms. Ferrara's inspection on May 15th disclosed that no overflight had occurred. Since the Hobbs meter was sitting at 6177.2 hours on the day of the inspection, the aircraft could have flown another 5.5 hours. However, as mentioned in the principles above, a complaint may still be considered objectively reasonable at the time it was made even if it is subsequently proven inaccurate. Again, based on his knowledge of the accelerated aircraft usage between May 3 and May 10 of six hours a day, coupled with the resistence of Mr. Horna and Mr. Gordon to give him daily flying reports after May 10, Mr. Peck did have a reasonable basis for his complaint. I also note that Mr. Peck's complaint was not outside the universe of possibilities. Just a few days after Mr. Peck's overflight complaint, on May 19th, Island Express flew its aircraft several hours to the extent that the aircraft did indeed overfly the next maintenance inspection that was required at 6182.7 flying hours. By its own admission, through Mr. McHugh's report, Island Express demonstrated that its aircraft was susceptible to being overflown. Finally, I note my finding that Mr. Peck's complaint about the potential violation of the next required phase inspection is consistent with the mandate to liberally construe the definition of protected activity.

Issue No. 3 - Respondent's Knowledge of Complaint

By demonstrating that he engaged in the protected activity of reporting to the FAA on May 15, 2000 that Island Express may be overflying the next required maintenance inspection, Mr. Peck has proved the first element of a *prima facie* case of illegal employee discrimination. Next, he must establish that the Respondent, Island Express, was aware of his complaint and then reacted to it by terminating his services as Chief of Maintenance.

Initially, just based on the simple timing of events, Mr. Peck is able to develop a circumstantial case that Ms. Horna and Mr. Gordon were aware of his protected prior to his termination as the Director of Maintenance. In the morning of May 15, 2000, Mr. Peck at Executive Airport calls Ms. Ferrara, an FAA inspector, with his complaint. In response, Ms. Ferrara conducts a no-notice ramp inspection of the Island Express aircraft at International Airport. After her inspection, and in the presence of the Island Express chief pilot, Mr. Horna, Ms. Ferrara, while still at International Airport, talks with Mr. Peck over the phone and gives him the aircraft Hobbs meter reading. Two days later, on May 17, 2000, Mr. Peck receives a letter dated the same day he made his complaint to the FAA, May 15, 2000, informing him that Island Express no longer needs his maintenance service. Absent any other evidence, this sequence of events, in particular the nearly contemporaneous adverse action in relation Mr. Peck's FAA complaint, would provide strong circumstantial evidence of that Island Express was aware of his complaint.

However, that circumstantial evidence concerning May 15th does not stand in isolation and its probative weight starts to lose its measure upon consideration of other events leading up to May 15th and

some of Island Express' actions after the FAA inspection. In months prior to May 15, 2000, the FAA had conducted a couple of no-notice ramp inspections of the Island Express aircraft. In light of the prior inspections, Ms. Ferrara's arrival at International Airport to conduct a ramp inspection on May 15th was not out of the ordinary and thus not a reason to arouse Island Express' suspicions that someone had made a complaint.

Also, in the months prior to May 15th, the financial problems of Island Express seemed to increase; a potential investor buy-out failed to come to fruition; and the company owed several months of rent for the Executive Airport hanger. Partially due to these financial stresses, the business relationship between Island Express and Mr. Peck deteriorated to the extent that Mr. Peck began to doubt his ability to rely on Island Express for accurate flying times. Similarly, Island Express became concerned about its trust in Mr. Peck's maintenance advice to the extent that Mr. Horna challenged Mr. Peck's recommendation that an aircraft cylinder be replaced. As a consequence, just before May 15th, Mr. Horna had Mr. Peck run cylinder compression checks in his presence. The tests showed all the cylinders were within normal limits. When Ms. Horna at Executive Airport became aware on May 15th of the normal cylinder compression checks, she decided to terminate Island Express' maintenance relationship with Mr. Peck. So, while the timing seems exceptionally remarkable, Ms. Horna is engaged in the process of terminating Mr. Peck's services based on his apparently unfounded opinion that an engine cylinder needed repair, at the same time Mr. Peck is making his complaint and Ms. Ferrara is accomplishing a ramp inspection.

Next, even the seemingly significant circumstantial evidence of Ms. Ferrara's phone call to Mr. Peck in the presence of the Island Express chief pilot is reduced in probative value when considering Mr. Peck's role with Island Express at that time. Since Mr. Peck was the company's Director of Maintenance and the FAA ramp inspection identified several maintenance deficiencies that needed correction, Ms. Ferrara's phone call to Mr. Peck would not necessarily cause the chief pilot to suspect Mr. Peck had made a complaint. Considering the noted maintenance shortfalls, Ms. Ferrara's conversation with the Island Express Director of Maintenance, Mr. Peck, was the next logical step in getting the noted deficiencies corrected. Concerning the discussion about the Hobbs meter, Ms. Ferrara merely affirmatively responded that the meter had been inspected and then stated that other maintenance issues had been identified. In light of the whole context of that conversation, including deficiencies identified in the FAA inspection, Ms. Ferrara's purpose in talking to Mr. Peck, and Mr. Peck's position of the Director of Maintenance, I find Ms. Ferrara's version of the conversation as potentially overheard by the Island Express chief pilot insufficient evidence to conclude that Mr. Horna could have reasonably determined, despite his denial, that Mr. Peck had made a complaint to the FAA which led to Ms. Ferrara's ramp inspection. Additionally, the other participant to this conversation, Mr. Peck, only testified through written documents in the claimant's exhibits, which provide insufficient detail to refute Ms. Ferrara's recollection of her post-inspection phone conversation with Mr. Peck on May 15, 2000.

Ms. Horna's and Mr. Gordon's actions on the evening of May 15th, and the days after, in regards to Mr. McHugh also seems to diminish any circumstantial evidence that might establish their knowledge of Mr. Peck's FAA complaint. When Mr. Horna flew the Island Express aircraft to the Opa Locka

Airport for Mr. McHugh's inspection, the first item of business was a request to run a cylinder compression test. Not only did this test duplicate the earlier normal compression check run by Mr. Peck and Mr. Horna, it establishes that the cylinder replacement issue, which arose prior to May 15th and Mr. Peck's complaint to the FAA, continued to be an important maintenance concern for Island Express even after the FAA inspection. Also, turning to the events of May 19th, I consider it highly unlikely that if Ms. Horna and Mr. Gordon had knowledge of Mr. Peck's overflight complaint to the FAA, Island Express would a few days later actually validate Mr. Peck's complaint by flying its aircraft a couple hours past its next required maintenance inspection. In other words, by overflying the inspection phase point on May 19th, Island Express acted as though it had no knowledge that an overflight complaint had just recently been submitted to the FAA on May 15th. Had the company been aware of that complaint, they surely would not have then a few days later overflown that regulatory-mandated maintenance inspection.

After considering all the circumstantial evidence from before, during, and after May 15, 2000, my ability to determine whether Island Express had knowledge of Mr. Peck's FAA complaint at the time of the adverse personnel action that terminated his maintenance services becomes uncertain. Ultimately, however, the resolution of the Respondent's knowledge issue rests not on murky circumstantial evidence but on clear evidence derived from credible testimony of Mr. Gordon, Ms. Horna, and, most importantly, Ms. Ferrara.

Both Mr. Gordon and Ms. Horna, the principal actors in the termination of Mr. Peck's maintenance services, deny knowing about Mr. Peck's complaint during the May 15th to May 17th time frame. Although I have already determined that Mr. Gordon and Ms. Horna were credible witnesses, I recognize their credibility might be challenged based on their stake in this case. On the other hand, Ms. Ferrara does not stand to gain in any manner in this case. Her exceptionally reliable denial that she told anyone at Island Express about Mr. Peck's complaint definitely corroborates the denial of knowledge by Mr. Gordon and Ms. Horna and resolves the issue against Mr. Peck.

In summary, Mr. Peck has failed to establish through the preponderance of the evidence that either Mr. Gordon or Ms. Horna knew, prior to terminating his services as the Director of Maintenance, that he had registered an air safety complaint with Ms. Ferrara of the FAA. The circumstantial evidence is unclear at best and is definitively outweighed by the believable denials of knowledge by Mr. Gordon and Ms. Horna as significantly corroborated by the credible testimony of Ms. Ferrara that she informed no one at Island Express during the course of investigation that Mr. Peck had made a complaint. Since Mr. Peck has failed to carry his burden of proof in establishing the second requisite element that the Respondent, Island Express, had knowledge of his protected activity at the time of the adverse personnel action, he has failed to establish a *prima facie* case of illegal employee discrimination under AIR 21.[15]

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[15]Since Mr. Peck is unable to establish a *prima facie* case of employee discrimination, I need not address the fourth issue of whether the Respondent had a legitimate reason for terminating Mr. Peck or the fifth issue of whether Mr. Peck would ultimately prevail in carry his burden of proof. Had I considered those issues, I just note

(continued...)

Issue No. 6

Under provisions of 49 U.S.C. § 42121 (b) (3) (C), Island Express seeks recoupment of its attorney fees up to $1,000 on the basis that Mr. Peck's AIR 21 employee discrimination complaint was either brought in bad faith or frivolous.

Although Mr. Peck and the representatives of Island Express did not like each other (to put it mildly), I find insufficient evidence to find Mr. Peck brought his discrimination complaint in bad faith. The circumstantial evidence known to Mr. Peck at the time he filed his AIR 21 discrimination complaint and his documentary evidence indicated a firm and sincere belief that he had been the victim of a retaliatory termination.

I also find the Mr. Peck's belief that he was an employee of Island Express was not frivolous. Based on his employee status with Island Express up to February 2000 and his continued work on its aircraft and retention of his Director of Maintenance title, Mr. Peck's conclusion that he was still an employee of the company on May 15th, while legally incorrect in my opinion, was none the less both understandable and not frivolous.

Similarly, his complaint that Island Express illegally terminated his maintenance services is not frivolous. As highlighted in my discussion of the circumstantial evidence in this case, the initial presentation of the circumstances surrounding Mr. Peck's discharge, most notably the near simultaneous events of Mr. Peck's complaint, the resulting FAA inspection, and the May 15th termination letter, do seem to point to a sinister motive behind Mr. Peck's removal. In light of those circumstances, and considering that Mr. Peck had to submit his AIR 21 discrimination complaint within 90 days of the adverse personnel action, before all the evidence became known to Mr. Peck, including Mr. McHugh's findings of maintenance deficiencies, I find an insufficient basis to characterized Mr. Peck's discrimination complaint frivolous.

Since Island Express has not demonstrated that Mr. Peck's AIR 21 discrimination complaint was either frivolous or brought in bad faith, the company is not entitled to the relief set out in 49 U.S.C. § 42121 (b) (3) (C).

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[15](...continued)
that pre-May 15th problems encountered by Island Express with Mr. Peck's maintenance work, the numerous maintenance deficiencies identified in the May 15th FAA inspection, which were made known to Island Express, the company's concern over the unfounded cylinder replacement recommendation by Mr. Peck, and the additional maintenance shortfalls later identified by Mr. McHugh, strongly suggest that Mr. Peck would also experience difficulty in prevailing on these two issues.

CONCLUSIONS

At the time Mr. Peck called the FAA inspector, Ms. Ferrara, on May 15, 2000 and expressed his concern about the timely maintenance inspection of the Island Express aircraft, he was an independent contractor for, rather than employee of , Island Express. Consequently, in the absence of an employer-employee relationship between Mr. Peck and Island Express, there is no subject matter jurisdiction and his AIR 21 discrimination complaint must be dismissed.

Although Mr. Peck engaged in a protected activity under AIR 21 by reporting to an FAA inspector that Island Express may be overflying its next required maintenance inspection, he has failed to establish that representatives of Island Express were aware of that complaint at the time they terminated his services as the Director of Maintenance. Having failed to prove the Respondent's knowledge of his protected activity, one of the requisite elements of a *prima facie* case of discrimination under AIR 21, his AIR discrimination complaint must be dismissed.

Mr. Peck's belief that he was an employee of Island Express was not frivolous. Likewise, his AIR 21 discrimination complaint was neither frivolous nor brought in bad faith. As a result, Island Express' request for the partial recoupment of attorney fees under AIR 21 must be denied.

RECOMMENDED ORDER

Accordingly, for the reasons discussed above:

1. The complaint of Mr. WILLIAM H. PECK against SAFE AIR INTERNATIONAL, INC. d/b/a ISLAND EXPRESS, under Section 519 of the Aviation Investment and Reform Act for the 21st Century is **DISMISSED.**

2. The request of SAFE AIR INTERNATIONAL, INC. d/b/a ISLAND EXPRESS, for the assessment of partial attorney fees against Mr. WILLIAM H. PECK, under Section 519 of the Aviation Investment and Reform Act for the 21st Century is **DENIED.**

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: December 19, 2001
Washington, D.C.

NOTICE: Based on the language of AIR 21 requiring Secretarial action on a complaint, I will forward this Recommended Decision and Order and the administrative file for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. However, in light of the absence of regulations promulgated under AIR 21, the parties are advised to consider preserving their rights of appeal by also directly filing with the Administrative Review Board, within ten business day of the date of this Recommended Decision and Order, a protective appeal of any adverse finding and conclusion. Any party submitting a protective appeal shall also serve a copy on all parties and on the Chief Administrative Law Judge.